

LYNCHBURG CITY COUNCIL

Agenda Item Summary

MEETING DATE: **March 25, 2003, Work Session**

AGENDA ITEM NO.: 7

CONSENT:

REGULAR: **X**

CLOSED SESSION:

(Confidential)

ACTION: **X**

INFORMATION:

ITEM TITLE: **A Resolution to Address Council Member Foster's Participation in the Approval of the Fiscal Year 2004 Budget**

RECOMMENDATION: Consider the adoption of a resolution separating approval of funding for the Alliance for Families and Children from the approval of the rest of the General Fund appropriation.

SUMMARY: The Commonwealth's Attorney has issued an opinion (attached) regarding the ability of Council Member Foster to participate in discussions and vote on the adoption of the FY04 Budget given that she is an employee of the Alliance for Families and Children, which receives some of its funding from the City. Since that opinion was issued there have been discussions and research in an attempt to allow Mrs. Foster to participate in the budget process to the fullest extent possible in fulfillment of her responsibilities as a member of City Council. As a result, Mr. Petty has issued the attached letters providing further clarification. Mr. Petty has concluded that Mrs. Foster is able to participate in budget deliberations regarding the funding of all agencies and departments except for the Alliance for Families and Children. He maintains his opinion, however, that Mrs. Foster may not vote on approval of any portion of the budget that includes an appropriation to the Alliance. This would include the General Fund and the Community Development Block Grant Fund.

Mr. Petty suggests that one way for Mrs. Foster to be able to vote on the General Fund appropriation would be to separate funding for the Alliance from the approval of the rest of the General Fund. The attached resolutions provide two ways to do that; the first would separate the funding for all Civic, Community and Regional Organizations from the General Fund, while the second would only separate funding for the Alliance from the General Fund.

PRIOR ACTION(S): None

FISCAL IMPACT: N/A

CONTACT(S): William Petty, Kimball Payne, Walter Erwin

ATTACHMENT(S): Opinion and Letters from the Commonwealth's Attorney, Memorandum regarding proposed funding for non-profits, Resolution

REVIEWED BY: lkp

RESOLUTION

BE IT RESOLVED THAT, for the purpose of adopting the Fiscal Year 2004 Budget, City Council will separate funding for Civic, Community & Regional Organizations from the appropriation for the General Fund and will approve the appropriation for those organizations by separate resolution.

Adopted:

Certified: _____
Clerk of Council

ALTERNATE RESOLUTION

BE IT RESOLVED THAT, for purposes of adopting the Fiscal Year 2004 Budget, City Council will separate funding for the Alliance for Families and Children from Civic, Community & Regional Organizations in the General Fund and will consider the appropriation of funds for that organization by separate resolution.

Adopted:

*Certified: _____
Clerk of Council*



OFFICE OF THE
COMMONWEALTH'S ATTORNEY FOR THE CITY OF LYNCHBURG
MONUMENT TERRACE BUILDING
901 CHURCH STREET
P.O. BOX 1539
LYNCHBURG, VIRGINIA 24505
(434) 847-1593
FAX (434) 846-5038
WWW.OCALYNCHBURG.COM



WILLIAM G. PETTY
COMMONWEALTH'S ATTORNEY

MICHAEL R. DOUCETTE
H. CARY PAYNE
TERESA A. POLINSKE
DEPUTY COMMONWEALTH'S ATTORNEYS

March 20, 2003

JAMES D. BEARD
JEFFREY P. BENNETT
SUSAN W. HARTMAN
GRETCHEN G. HUTT
ROBIN L. FARKAS
JANELL R. JOHNSON
EDWARD A. LUSTIG
ASSISTANT COMMONWEALTH'S
ATTORNEYS

Mr. Carl B. Hutcherson, Jr.
City Hall
Lynchburg, VA 24505

Dear Mayor Hutcherson:


Last week I was asked to provide options that would permit Councilwoman Foster to participate in or vote on the 2004 Operating Budget. Since that request, new facts have been submitted to me that altered the advice I provided Mrs. Foster in my letter of March 4, 2003. I am enclosing a letter to her dated March 19, 2004 that sets out these new facts and my conclusion. In summary, I have concluded that at the present time she may participate in the budget negotiations, but may not vote on the final budget.

The State and Local Conflict of Interest Act prevents her from voting on any matter in which she or her employer has a financial interest. Because the Alliance receives direct appropriations from the Operating Budget, she has a financial interest in that matter. Obviously, this financial interest would cease to exist if she were no longer employed by the Alliance for Family and Children or if the Alliance no longer received funding from the City. The third option that would eliminate her financial interest in the 2004 Operating Budget would be to remove any direct funding to the Alliance from the budget and have Council consider that funding in a separate resolution. In that case, Mrs. Foster could vote on the budget, and would only be required to abstain from the vote on the individual resolution pertaining to the Alliance.

If you need any further information or clarification please feel free to contact me.

With kind regards, I am,

Very truly yours,



William G. Petty

Cc: L. Kimball Payne, III



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P.O. BOX 1539
LYNCHBURG, VIRGINIA 24505
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FAX (434) 846-5038
WWW.OCALYNCHBURG.COM



WILLIAM G. PETTY
COMMONWEALTH'S ATTORNEY

March 4, 2003

MICHAEL R. DOUCETTE
H. CARY PAYNE
TERESA A. POLINSKE
DEPUTY COMMONWEALTH'S ATTORNEYS

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ASSISTANT COMMONWEALTH'S
ATTORNEYS

Mrs. Joan F. Foster
Lynchburg City Council
P.O. Box 60
Lynchburg, VA 24505

Dear Councilwoman Foster:

Pursuant to Virginia Code §2.2-3126 you have requested an opinion from this office on whether the following facts would constitute a violation of the Virginia State and Local Conflict of Interest Act, §§ 2.2-3100 et. seq. (the "Act"). The conclusions expressed in this opinion are based on the facts set forth below. If these facts are incorrect or incomplete in any material way, you may not rely on this opinion in the event your actions are subsequently challenged. I would also note that I am not in a position to make a factual determination as to the scope of your authority or responsibilities with the Alliance. This opinion presumes that a court would find them to be as noted below.

I. Facts

You have asked whether under the following facts you may serve on City Council without violating the Act. The facts upon which this opinion is based come from your letter of February 28, 2003 and your e-mail response to my request for additional information regarding your job responsibilities. It is my understanding that you are presently the Chief Operating Officer for the Alliance for Families and Children (the Alliance). You receive a salary from the Alliance in excess of \$10,000 per year but you have no ownership interest in the agency.

The Alliance is a regional non-profit organization that provides a variety of services to residents of Central Virginia. In past years the Alliance has received the following funding from the City of Lynchburg:

1. Since 1999 the Alliance has received Community Development Block Grant (CDBG) funds that are awarded to the City by the federal government.
2. In the FY 2003 the Alliance received Urban Development Action Grant (UDAG) funds, also awarded to the City by the federal government.
3. For the past five years the Alliance has received general funds from the City. The City's FY 2003 Operating Budget contains an appropriation of \$44,200 to the

Alliance. The proposed FY 2004 Operating Budget contains a similar appropriation.

The CDBG and UDAG funds constitute a fixed sum of money provided to the City of Lynchburg by the federal government. The City is the administrator of the funds and through an application process selects the agencies to which those funds will be distributed and the amount each agency will receive. The selection of the agencies receiving these funds and the amount each agency receives is discretionary with Council. The general funds received by the Alliance are included in the City's Operating Budget and paid from the City's general fund.

The Alliance also enters into agreements with the Lynchburg City Schools. The School Administration leases space at market rates from the Alliance. From time to time the Alliance rents space from the Lynchburg City Schools. The school system will sometimes waive its standard rental fee and charge the Alliance only for the actual costs incurred by the Alliance's use of the space.

Since your election to City Council the Chief Executive Officer of the Alliance has expressly prohibited you from participating in the above-mentioned arrangements between the Lynchburg City Schools and the Alliance and you do not in fact participate in such contracts. In addition, the CEO of the Alliance has expressly prohibited you from participating in the procurement of any grant or general funding from the City of Lynchburg and you do not in fact participate in any such contracts.

II. General Rule

Because you receive in excess of \$10,000 in salary from the Alliance, you are deemed by the Act to have a personal interest in the Alliance and a personal interest in any contract to which the Alliance was a party.¹ The Alliance is considered a business, despite the fact that it is a not for profit organization² and the award of grant or general funds by the City constitutes a contract

1 "Personal interest" means a financial benefit or liability accruing to an officer or employee or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; or (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business. Va. Code § 2.2-3101.

2 "Business" means a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, trust or foundation, or any other individual or entity carrying on a business or profession, whether or not for profit. Va. Code § 2.2-3101.

between the Alliance and the City.³ Finally, the lease of office space by the Alliance to the Lynchburg City Schools and the payment of money by the Alliance to the Lynchburg City School for the use of school property constitute contracts between the Alliance the Lynchburg School Board.⁴

The general rule pertaining to your inquiry is found in §2.1-639.7(A) of the Act. That sub-section states:

“A. No person elected or appointed as a member of the governing body of a county, city or town shall have a personal interest in (i) any contract with his governing body, or (ii) any contract with any governmental agency that is a component part of his local government and which is subject to the ultimate control of the governing body of which he is a member, or (iii) any contract other than a contract of employment with any other governmental agency if such person's governing body appoints a majority of the members of the governing body of the second governmental agency.”

This section, absent an applicable exception, prohibits you or the Alliance from entering into any contract with or receiving funding from the City or the Lynchburg School Board while you serve on Council.⁵

III. Applicable Exceptions

§2.2-3110 of the Act provides a series of exceptions to the prohibition of §2.2-3107. These exceptions include the following:

3 “Contract” means any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency that involves the payment of money appropriated by the General Assembly or political subdivision, whether or not such agreement is executed in the name of the Commonwealth, or some political subdivision thereof. “Contract” includes a subcontract only when the contract of which it is a part is with the officer's or employee's own governmental agency. Va. Code § 2.2-3101.

4 Because you do not have any ownership interest in the Alliance, this matter can be analyzed without reference to an exception in the Act pertaining to a lease. Accordingly, I am treating this as a contract for purposes of this inquiry. Although it is certainly possible to consider these agreements to be a lease (see Conflict of Interest Opinion to Stewart Hobbs dated June 25, 1999) doing so would not alter my conclusion.

5 Although it might appear at first glance that the exception found in §2.2-3107(B)(1)(ii) could apply, I have previously held that this exception only applies to a member of Council who has a contract or employment with a second governmental agency. See Conflict of Interest Opinion to Junius A. Haskins, Jr. dated June 25, 1992.

"4. An officer or employee whose sole personal interest in a contract with the governmental agency is by reason of income from the contracting firm or governmental agency in excess of \$10,000 per year, provided the officer or employee or a member of his immediate family does not participate and has no authority to participate in the procurement or letting of such contract on behalf of the contracting firm and the officer or employee either does not have authority to participate in the procurement or letting of the contract on behalf of his governmental agency or he disqualifies himself as a matter of public record and does not participate on behalf of his governmental agency in negotiating the contract or in approving the contract;"

IV. Opinion

It is my opinion that the exception noted above applies to the factual situation you describe. Your sole financial interest in the Alliance is due to your salary. Because you do not participate on behalf of the Alliance in the procurement of grant or general funds from the City of Lynchburg or in contracts between the Alliance and the Lynchburg School Board, **and** you have no authority to participate in these matters on behalf of the Alliance, it is my opinion that **the Act does not prohibit you from serving on City Council while employed by the Alliance.**

While the members of the Lynchburg School Board are appointed by City Council, the Board is an independent agency. Because of the Board's autonomous authority, you, as a member of City Council, have no authority to participate in the procurement or letting of any contracts on behalf of the Board. Therefore, you need not take further action concerning these contracts.

§2.2-3110(4) of the Act does, however, require certain actions on your part pertaining to funds awarded to the Alliance by City Council. Obviously, your position as a member of City Council includes the authority to participate in the award of both grant and general funds. Therefore, in order to come within the exception contained in §2.2-3110(4) **you must:**

1. Disqualify yourself as a matter of public record in all matters pertaining to the award of grant or general funds to the Alliance; and
2. Refrain from any participation on behalf of City Council in any matters pertaining to the award of grant or general funds to the Alliance.

It is important to note that ~~these two requirements go beyond simply not voting on an issue. The term "participation" includes any debate or discussion of the matter as a member of Council. It would also include any attempt to persuade or influence any other member of City Council to take a position on the matter.~~⁶

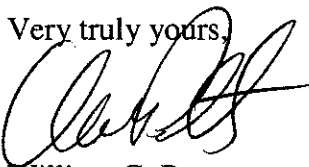
⁶ I would note in passing that there have been occasions in the past when officials who were disqualified from acting have too narrowly applied the scope of the prohibition on participation. I am including this

Mrs. Joan F. Foster
March 4, 2002
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An appropriation of general funds to the Alliance is included in the proposed FY 2004 Operating Budget. Accordingly, under the Act you must disqualify yourself from consideration of and participation in any and all matters pertaining this Operating Budget. It is my understanding that the CDBG and UDAG grant funds are awarded by City Council in separate resolutions. When these matters come before Council you must disqualify yourself from consideration of and participation in any resolution or other action awarding funds to any agency from either of these two sources.⁷

If you have any questions concerning this opinion, or if you need further assistance in the future, please feel free to contact me.

With kind regards, I am,

Very truly yours,

William G. Petty

Cc: Walter C. Erwin, III ✓
City Attorney

Patricia Kost
Clerk of Council

caution in this opinion, as well as future opinions in order to make clear that it serves as a virtual removal of the disqualified individual from the dais.

⁷ I have considered the question of whether the disqualification requirements of §2.2-3110(4) pertain only to the line item in the Operating Budget involving funding to the Alliance, or whether it applies to the Operating Budget as a whole. In concluding that it pertains to the entire Operating Budget, I rely on the definition of a contract noted above. The line item appropriation to the Alliance is analogous to a subcontract or portion of the overall contract. §2.2-3101 includes subcontract in the definition of contract if the contract is with the officer's own agency. In this case, the contract is with City Council. Because there is a finite amount of money subject to appropriation, any decision to allocate funding to any component of the Operating Budget obviously has an effect on the amount available to appropriate to the Alliance. Finally, Council considers adoption of the Operating Budget in a single resolution. For these reasons, I have concluded that the Operating Budget should be considered a single contract. The same analysis applies to the awarding of the grant funds.



WILLIAM G. PETTY
COMMONWEALTH'S ATTORNEY

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March 19, 2003



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JEFFREY P. BENNETT
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EDWARD A. LUSTIG
ASSISTANT COMMONWEALTH'S
ATTORNEYS

Mrs. Joan F. Foster
Lynchburg City Council
P.O. Box 60
Lynchburg, VA 24504

Dear Councilwoman Foster:

I am responding to your request for further clarification of my advice to you regarding the Virginia State and Local Conflict of Interests Act as set out in my letter of March 4, 2003. Specifically, you are requesting clarification of the disqualification requirements of §2.2-3110(4) of the Act in light of the materials submitted to me yesterday afternoon by the City Attorney and today by the City Manager. My letter of March 4, 2003 and the facts set out in that letter should be considered a part of this opinion.

I had previously advised you that the Act did allow you to serve on City Council while employed by an agency that received funding from the City. I cautioned you, however, that the section of the law that permitted you to serve on Council also required you to abstain from participating in any matter in which your employer had a financial interest. Because there was an appropriation to your employer in the proposed Operating Budget the Act required you to disqualify yourself from consideration of and participation in all matters pertaining to this budget.

Yesterday afternoon I was provided information that was not included in your request that does have a significant effect on my prior advice. Specifically, the City Attorney submitted information regarding Council action taken at its meeting of November 26, 2002. On that date, by motion and vote, Council revoked the existing policy on City funding of non-profit agencies, including your employer the Alliance for Families and Children, and decided not to make any changes to the list of agencies that are currently funded. In a memo to me dated March 19, 2003 L. Kimball Payne, III, City Manager, said he considered this to be Council's direction that currently funded non-profit agencies would continue to receive the same level of funding in the 2004 Operating Budget. His budget proposal reflects this action. I note that the minutes of the vote on this item reflect that you recognized the need to abstain, so noted that in the minutes, and did in fact abstain from voting.

The Act requires you to refrain from participation in "negotiating the contract or in approving the contract" that provides funding to your employer.¹ It seems to me that with Council already having voted to continue funding to the Alliance at current levels, that issue is currently no longer involved in the budget negotiations. Accordingly, as long as that decision remains in effect, I do not believe the Act prohibits your participation in the budget negotiations as they pertain to all other agencies.

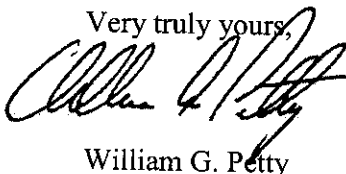
At some point City Council will be called upon to formally adopt the budget and thus officially appropriate all the funds in the budget. This clearly consists of an approval of the budget. Because your employer does have an appropriation affected by that approval, you would have to abstain from that vote.

I want to mention that you do have the right under the Act to request that the Attorney General review this entire opinion. If you would like to do so either Walter Erwin or I would be glad to assist.

If you have any further questions, please feel free to contact me.

With kind regards, I am,

Very truly yours,

A handwritten signature in black ink, appearing to read "William G. Petty", is written over the typed name.

William G. Petty

¹ As I noted in my prior opinion to you, the term "Contract" when used in the Act includes any agreement on the part of the City that involves the payment of money. See Attorney General's COI Advisory Opinion No 00-A09 decided January 19, 2001.



MEMORANDUM

TO: William G. Petty, Commonwealth's Attorney

FROM: L. Kimball Payne, III, City Manager

DATE: March 20, 2003

SUBJ: Funding of Non-Profits in the Proposed FY04 Budget

You have asked me to explain how I came to make the recommendation in the Proposed FY04 Budget for the funding of non-profit agencies.

Prior to November 26, 2002 City Council had adopted a policy regarding the funding of non-profits. One of the provisions of the policy stated that only those agencies that had received funding in the past would be routinely funded in the future and the amounts of funding would be frozen at the previous levels. There were also provisions in the policy to provide for additional funding of non-profits if certain conditions were met. Due to fiscal constraints Council had not followed the policy with respect to the additional funding and last year I recommended that the policy be rescinded.

On November 26, 2002 Council rescinded the policy. An excerpt of the minutes of that meeting memorializing Council's action is attached. You may also review my Council report on the matter by accessing the Council agenda for that meeting through the Internet.

You will note in the excerpt of the minutes that, when it rescinded the policy, Council directed that no changes be made to the list of agencies currently being considered for funding through the annual budget process. Although not stated in the minutes, it was also my understanding that Council meant for the proposed budget to include funding for those agencies in the same amounts as previous years. Accordingly, my proposed budget includes funding for those non-profits that had been previously funded and in the same amounts as previously approved.

Please let me know if you have any questions.

CC: City Council
City Attorney

Excerpt of the Minutes of November 26, 2002 Lynchburg City Council Meeting

// Deputy City Manager Bonnie Svrcek provided an overview of options with regard to the Not-for-Profit Policy, as adopted by City Council on November 9, 1999. City Manager Kimball Payne explained that the policy had never been implemented due to financial constraints, and that staff needed direction regarding the most appropriate approach for considering not-for-profit funding requests for future budget cycles. Representatives from several non-profit agencies asked that City Council continue to fund those agencies that were grandfathered in the budget process prior to the adoption of the policy. City Manager Payne stated that his preference would be to eliminate the policy and not make any changes at this time to the list of agencies currently being considered for funding through the annual budget process. Council Member Foster stated that she would abstain from any vote taken on this matter in that the Alliance for Families & Children receives funding from the City. Council Member Adams made a motion, seconded by Council Member Garber, to rescind the Not-for-Profit Policy and not make any changes to the list of agencies that were grandfathered in the annual budget process prior to the adoption of the policy, and Council by the following recorded vote approved the motion:

Ayes: Adams, Barksdale, Dodson, Garber, Seiffert

5

Noes:

0

Absent: Hutcherson

1

Abstention: Foster

1